IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

BONNIE C. SATO,

Plaintiff(s),

v.

WACHOVIA MORTGAGE, FSB, et. al.,

Defendant(s).

/

NO. 5:11-cv-00810 EJD (PSG)

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; DENYING AS MOOT DEFENDANT'S MOTION TO STRIKE; GRANTING DEFENDANT'S MOTION TO REMAND; DENYING AS MOOT PLAINTIFF'S EX PARTE MOTION TO AMEND COMPLAINT

[Docket Item Nos. 11, 12, 17, 26]

Within this action alleging the wrongful institution of foreclosure proceedings, Defendant Wachovia Mortgage, FSB ("Wachovia") moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and to strike portions of the complaint pursuant to Federal Rule of Civil Procedure 12(f). Wachovia also moves to remand the unlawful detainer portion of this case to the Monterey Superior Court on various grounds. After reviewing the complaint as well as the moving, responding and reply papers for each motion, the Court found these matters suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b). As such, the hearing previously scheduled was vacated and the motions submitted. For the reasons set forth below, the motion to dismiss will be granted with leave to amend in part, rendering the motion to strike moot. The

motion to remand will be granted.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1986, Sato purchased the property at issue located at 25500 Via Marquita in Carmel (the "Property") by executing a Deed of Trust in the amount of $317,000.00. Complaint at ¶ 10. Sato then refinanced the Property in 2008 through Wachovia. Id. at ¶ 11. On the corresponding Deed of Trust for this new loan, Wachovia was listed as the "lender" and Golden West Savings Association Service Company was listed as the "trustee." Id.

Sato remained current on her mortgage payments. Id. at ¶¶ 12-15. However, after a series of personal events which diminished her financial status, Sato contacted Wachovia in early 2008 and requested information about a loan modification since her current loan was an adjustable rate, negative amortization loan. Id. at ¶¶ 12-17. Wachovia representatives told Sato "numerous times" that she must stop making mortgage payments in order to for Wachovia to review her loan for a potential modification. Id. at ¶ 18. Relying on these statements, Sato did in fact stop paying her mortgage and believed Wachovia was in the process of reviewing of her loan. Id. at ¶¶ 21, 23.

Sato provided all information requested of her during the period her loan was under review. Id. at ¶ 25. According to Sato, however, Wachovia "routinely botched up documents, lost documents and asked for the same documentation over and over again" and despite her requests, Sato could not get a straight answer from Wachovia regarding the status of her loan. Id. at ¶¶ 24, 26. Wachovia never returned a "valid answer" on Sato's potential loan modification, and never discussed with her options to avoid foreclosure." Id. at ¶¶ 27-29. At some point, Wachovia stopped reviewing Sato's account and initiated foreclosure proceedings. Id. at ¶ 31. Thus, on June 28, 2010, a Notice of Default was recorded by Defendant NDex West ("NDex"). Id. at ¶ 35. Thereafter, NDex was substituted as Trustee (although they had already filed a Notice of Default) on August 13,

[1] This disposition is not designated for publication in the official reports.

2010, and a Notice of Trustee's Sale was filed by NDex on September 30, 2010. Id. at ¶¶ 36, 37.

Sato initiated this case in Monterey County Superior Court on January 13, 2011, alleging eight claims for relief: (1) Quiet Title; (2) violation of California Civil Code § 2923.5; (3) violation of California Business and Professions Code § 17200 et. seq.; (4) intentional misrepresentation; (5) negligent misrepresentation; (6) promissory estoppel; (7) injunctive relief; and (8) recission. On February 22, 2011, Wachovia removed Sato's action to this court pursuant to 28 U.S.C. § 1332 et. seq. A subsequent unlawful detainer action brought by Wachovia in Monterey County Superior Court was thereafter removed by Sato on March 15, 2011, and consolidated into this case.

II. THE MOTION TO DISMISS

Wachovia moves to dismiss all of Sato's claims as pre-empted by the Home Owners' Loan Act ("HOLA"). As discussed further below, the court agrees that the first, second, seventh and eighth claims are preempted and cannot be saved through amendment. Thus, they will be dismissed without leave to amend. The remaining claims will be dismissed with leave to amend.

A. Request for Judicial Notice ("RJN")

In support of this motion to dismiss, Wachovia requested the court take judicial notice of various documents. See Wachovia's RJN. Exs. A-I. These documents include: (A) the Deed of Trust, (B) the Charter of Wachovia Mortgage, FSB, (C) a certification from the Comptroller of the Currency, (D) the Notice of Default, (E) the Substitution of Trustee, (F) the Notice of Trustee's Sale, (G) a letter from Wachovia to Sato informing her of a rate adjustment, (H) a letter from Wachovia to Sato informing her she did not qualify for a loan modification, and (I) the Trustee's Deed upon Sale.

For a motion to dismiss, the court does not generally look beyond the complaint as doing so may enter the purview of summary judgment. See Fed. R. Civ. P. 12(d). There are, however, two exceptions to this rule. First, the court may properly take judicial notice of material which is attached as part of the complaint or relied upon by the complaint. See Lee v. City of Los Angeles,

250 F.3d 668, 688-69 (9th Cir. 2001). Second, the court may properly take judicial notice of matters in the public record pursuant to Federal Rule of Evidence 201(b). Id. Rule 201(b) requires a "judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." A court "shall take judicial notice if requested by a party and supplied with the necessary information." See Fed. R. Evid. 201(d).

Here, Sato does not challenge the authenticity of the documents contained in Wachovia's RJN. Exhibits A, D, E, F and I are judicially noticeable as matters of public record. Exhibits G and H are judicially noticeable because they are relied upon by the complaint. Complaint at ¶¶ 31, 32. Additionally, exhibits B and C are judicially noticeable as "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); Hite v. Wachovia Mortg., No. 2:09-cv-02884-GEB-GGH, 2010 U.S. Dist. LEXIS 57732, at *6-9 (E.D. Cal. June 10, 2010); Gens v. Wachovia Mortg. Corp., No. CV10-01073 JF (HRL), 2010 U.S. Dist. LEXIS 54932, at *6-7 (N.D. Cal. May 12, 2010). Therefore, Wachovia's RJN is granted in its entirety.

B. Legal Standards

1. Dismissal under Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the...claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir.

2008). Moreover, the factual allegations "must be enough to raise a right to relief above the speculative level" such that the claim "is plausible on its face." Twombly, 550 U.S. at 556-57.

When deciding whether to grant a motion to dismiss, the court generally "may not consider any material beyond the pleadings." Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). The court must accept as true all "well-pleaded factual allegations." Ashcroft v. Iqbal, --- U.S. ----, 129 S.Ct. 1937, 1950 (2009). The court must also construe the alleged facts in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1988). "[M]aterial which is properly submitted as part of the complaint may be considered." Twombly, 550 U.S. at 555. But "courts are not bound to accept as true a legal conclusion couched as a factual allegation." Id.

Additionally, fraud-based claims are subject to heightened pleading requirements under Federal Rule of Civil Procedure 9(b). In that regard, a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. Proc. 9(b). The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985). To that end, the allegations must contain "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007).

If dismissal is granted, leave to amend should be freely allowed "unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv–Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); see Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000); Fed. R. Civ. P. 15(a). Where amendment to the complaint would be futile, the court may order dismissal with prejudice. Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996).

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2. Preemption under HOLA

Federal preemption of state laws stems from the Supremacy Clause of the Constitution. United States v. Arizona, No. 10-16645, 2011 U.S. App. LEXIS 7413, at *4. "[T]he laws of the United States...shall be the supreme law of the land...any Thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Generally, "[p]reemption analysis 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" City of Columbus v. Ours Garage & Wrecking Service, Inc., 536 U.S. 424, 438 (2002) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Congressional intent is therefore the "ultimate touchstone" of preemption inquiry. Medtronic, 518 U.S. at 485. Such intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982). State law may also be preempted by federal regulations. Id. at 153. "Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." Id. If these conditions are met, "the statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." New York v. Fed. Commc'ns Comm'n, 486 U.S. 57, 64 (1988).

There are times when the traditional presumption against preemption does not apply. Indeed, the presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence." United States v. Locke, 529 U.S. 89, 108 (2000). As relevant here, "Congress has legislated in the field of banking from the days of McCulloch v. Maryland, 17 U.S. 316, 325-26, 426-27, 4 L. Ed. 579 (1819), creating an extensive federal statutory and regulatory scheme." Bank of Am. v. City & County of San Francisco, 309 F.3d 551, 558 (9th Cir. 2002).

HOLA was enacted "to charter savings associations under federal law, at a time when record numbers of home loans were in default and a staggering number of state-chartered savings associations were insolvent." Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1004 (9th Cir. 2008). One of HOLA's central purposes was to restore public confidence in the banking system by consolidating the regulation of savings and loan associations with the federal government. Id. To achieve this purpose, Congress authorized the Office of Thrift Supervision ("OTS") to promulgate regulations governing federal savings associations. 12 U.S.C. § 1464; Silvas, 514 F.3d at 1005. OTS occupies the entire field in that regard. 12 C.F.R. § 560.2(a) (2011).

HOLA's implementing regulations set forth a list, "without limitation," of the categories of state laws that are expressly preempted:

> The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
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> ....
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> Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;
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> ....
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> Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages....

12 C.F.R. § 560.2(b)(4), (b)(9)-(10) (2011).

Although HOLA and its related regulations have been described as "so pervasive as to leave no room for state regulatory control," state laws may nonetheless survive a preemption claim in limited circumstances. Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979), aff'd, 445 U.S. 921. Those state laws which "only *incidentally affect* the lending operations of Federal savings associations or are otherwise consistent with the purposes of" the regulations may not be preempted." 12 C.F.R. § 560.2(c) (emphasis added). In order to determine

whether a particular state law has such an effect, the Ninth Circuit has provided the following process:

> When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

Silvas, 514 F.3d at 1005 (quoting OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sep. 30, 1996)).

B. Discussion

As a preliminary matter, it is important to note that Sato obtained the subject home loan from Wachovia Mortgage, FSB, in 2008. Complaint at ¶ 11; RJN, Ex. A. At that time, Wachovia was an independent "Federal savings bank chartered under section 5 of the Home Owners' Loan Act" and "subject to all lawful and applicable rules, regulations, and orders of the Office of Thrift Supervision." RJN, Ex. B. Although Wachovia was subsequently acquired by a national banking association, namely Wells Fargo Bank, N.A., district courts have held that HOLA preemption applies to all conduct relating to the loan. DeLeon v. Wells Fargo Bank, N.A., 729 F. Supp. 2d 1119, 1126 (N.D. Cal. 2010); Haggarty v. Wells Fargo Bank, N.A., No. C 10-02416 CRB, 2011 U.S. Dist. LEXIS 9962, at *10-11 (N.D. Cal. Feb. 2, 2011); Guerrero v. Wells Fargo Bank, N.A., No. CV 10-5095-VBF(AJWx), 2010 U.S. Dist. LEXIS 96261, at *8-9 (C.D. Cal. Sep. 14, 2010); Zlotnik v. U.S. Bancorp, No. C 09-3855 PJH, 2009 U.S. Dist. LEXIS 119857, at *17-19 (N.D. Cal. Dec. 22, 2009). This court agrees with the conclusions of its predecessors and will therefore examine this matter under HOLA. Sato's argument in opposition, which mainly discusses preemption under the

National Bank Act ("NBA"), 12 U.S.C. § 38 et. seq., is misplaced.[2]

1. Claim 2: Violation of California Civil Code § 2923.5

Sato alleges Wachovia violated the notice provisions contained in California Civil Code § 2923.5 by failing to contact her prior to foreclosure proceedings. The statute requires a mortgage lender to "contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Cal. Civ. Code § 2923.5(a)(2). A notice of default cannot be filed until 30 days after this contact is made. Cal. Civ. Code § 2923.5(a)(1).

Sato's claim under § 2923.5 must be dismissed for three reasons: (1) § 2923.5 does not apply to Sato's mortgage loan, (2) § 2923.5 is preempted by HOLA, and (3) Sato is no longer eligible for relief under § 2923.5 even if the statute was viable here.

As to the first reason for dismissal, the court need not look further than the plain language of the statute. "This section shall apply only to mortgages or deeds of trust recorded from *January 1, 2003, to December 31, 2007*, inclusive, that are secured by owner-occupied residential real property containing no more than four dwelling units." Cal. Civ. Code § 2923.5(I) (emphasis added). Sato obtained her loan in 2008. Complaint at ¶ 11. The deed of trust was recorded on January 29, 2008. RJN, Ex. A. Thus, § 2923.5 does not apply to Sato's loan.

Regarding preemption, "the overwhelming weight of authority has held that a claim under section 2923.5 is preempted by HOLA." Taguinod v. World Savings Bank, No. CV 10-7864-SVW, 2010 U.S. Dist. LEXIS 127677, at *20 (C.D. Cal. Dec. 2, 2010); see also, e.g., Nguyen v. Wells Fargo Bank, N.A., 749 F. Supp. 2d 1022, 1033 (N.D. Cal. 2010); Beall v. Quality Loan Serv., No. 10-CV-1900-IEG (WVG), 2011 U.S. Dist. LEXIS 29184, at *21-23 (C.D. Cal. Mar. 21, 2011). This

[2]In any event, it is likely preemption under NBA would lead to the same result. Zlotnik v. U.S. Bancorp, 2009 U.S. Dist. LEXIS 119857, at *19 (finding the preemption analysis under NBA as identical to that under HOLA).

is because the notice requirement imposed by § 2923.5 "implicates HOLA's express preemption of state laws regulating the 'processing' and 'servicing'" of mortgages. DeLeon, 729 F. Supp. 2d at 1127. Although one California appellate court has found against HOLA preemption, that court's determination is neither binding on this court, nor persuasive in its reasoning. See Mabry v. Sup. Ct., 185 Cal. App. 4th 208, 226-32 (2010). In the simplest of terms, the Mabry court held that since the term "foreclosure" does not explicitly appear in 12 C.F.R. § 560.2(b), state statutes that can be read to regulate only the foreclosure process, like § 2923.5, are not preempted by HOLA. Id. at 231. But looking to the categories of state laws expressly preempted by HOLA is only the first step of the two step inquiry prescribed by the Ninth Circuit. See Silvas, 514 F.3d at 1005; see also Giordano v. Wachovia Mortg., FSB, 5:10-cv-04661-JF, 2010 U.S. Dist. LEXIS 136284, at *11-14 (N.D. Cal. Dec. 14, 2010). Having undertaken the second step, this court finds - as others have found even after Mabry - that the additional notice and disclosure requirements imposed by § 2923.5 affect lending in a manner that cannot be described as incidental, even if foreclosure activities are not explicitly listed in 12 C.F.R. § 560.2(b). For this reason, § 2923.5 is preempted by HOLA.

In addition to the grounds stated above, Sato's claim under § 2923.5 would nonetheless be subject to dismissal even if the statute was applicable. The only available remedy available for a violation of § 2923.5 is the postponement of an impending foreclosure to permit the lender to comply with the statute. Mabry, 185 Cal. App. 4th at 223-24. Since the subject property has since been sold, Sato can obtain no further relief. RJN, Ex. I.

Claim 2 will be dismissed without leave to amend.

2. Claim 3: Violation of California Business and Professions Code

Sato alleges violations of California's Unfair Competition Law ("UCL"). Cal. Bus. & Prof. Code § 17200 et. seq. Under the UCL, there are three varieties of unfair competition: "acts or practices which are *unlawful*, or *unfair*, or *fraudulent*." Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 618-19 (1993). "Unlawful" practices are "forbidden by law, be it civil or criminal,

federal, state, or municipal, statutory, regulatory, or court-made." Saunders v. Sup. Ct., 27 Cal. App. 4th 832, 838 (1999). "Unfair" practices constitute "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." Cal-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999). The "fraudulent" prong under the UCL requires a showing of actual or potential deception to some members of the public, or harm to the public interest. See id. at 180; see also McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457 (2006); Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995). The UCL 'borrows' violations of other laws and treats them as unfair business practices, and also "makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." Cal-Tech, 20 Cal. 4th at 180.

Sato's UCL claim can be separated into three basic allegations: (1) "fraudulent representations" concerning the continuation of mortgage payments and the availability of a loan modification, (2) a violation of California Civil Code § 2923.6, and (3) a violation of California Civil Code § 2923.5. Sato contends she lost money and property as a result of Wachovia's conduct.

Sato's third allegation under § 2923.5, which is identical to her stand-alone claim under that statute, is preempted for the same reasons discussed in the preceding section. Similarly, the second allegation under § 2923.6 is preempted as plead. Although the UCL is a law of general applicability, it may nonetheless be preempted if, as applied, it is a type of state law contemplated by 12 C.F.R. § 560.2(b). Silvas, 514 F.3d at 1006. "If it is, the preemption analysis ends." Id. Here, Sato alleges Wachovia violated § 2923.6 by failing to modify her loan. Complaint at ¶ 64. This clearly falls under the preemption provisions for "processing, origination, sale or purchase of … mortgages" and "terms of credit." See Stefan v. Wachovia, No. C 09-2252 SBA, 2009 U.S. Dist. LEXIS 113480, at *8-10 (N.D. Cal. Dec. 7, 2009); see also Guerrero, 2010 U.S. Dist. LEXIS 96261, at *8-10. Since both allegations of statutory violations are subject to HOLA preemption, they

cannot support this UCL claim.

The first allegation presents a different issue. Sato contends Wachovia told her "numerous times" that she must default in order for her loan to be reviewed for potential modification, and that Wachovia deceived her by offering modification while simultaneously attempting to foreclose on the property. See Complaint at ¶¶ 18, 58, 65. District courts are split as to whether this type of misrepresentation claim is preempted by HOLA. Compare Guerrero, 2010 U.S. Dist. LEXIS 96261, at *8-10 (finding HOLA preemption for fraud claims arising from the loan modification process) and Stefan, 2009 U.S. Dist. LEXIS 113480, at *8-10, with DeLeon v. Wells Fargo Bank, N.A., No. 10-CV-01390-LHK, 2011 U.S. Dist. LEXIS 8296, at *14-21 (N.D. Cal. Jan. 28. 2011) (finding against preemption of false representation claims that did not impose obligations on lending activity). From these cases, it appears the distinction is this: alleged misrepresentations concerning "inadequate disclosures of fees, interest rates, or other loan terms" directly affect lending and are preempted, while allegations which "rely on the general duty not to misrepresent material facts" are not preempted. DeLeon, 2011 U.S. Dist LEXIS at *16-17.

Here, Sato's allegations could be read two ways, one which would render them preempted and one which would not. If the court infers from the allegations that loan modifications must always be made available, and that Wachovia was required to review, or even modify, Sato's loan and to hold all foreclosure efforts during that time, then the allegations are preempted because they surely seek to impose an obligation which affects lending. See Ortiz v. Wells Fargo Bank, N.A., No. C 10-4812 RS, 2011 U.S. Dist. LEXIS 58243, at *14-15 (N.D. Cal. May 27, 2011) (holding that ostensible UCL claim alleging misrepresentation of availability of loan modification is preempted by HOLA). However, if the court infers that the allegations only invoke a general duty to not engage in fraud during business dealings, then the claim only incidentally affects lending and is not preempted. DeLeon, 2011 U.S. Dist LEXIS at *18-19. At this stage in the case, the court must construe the complaint in the manner most favorable to Sato. Love, 915 F.2d at 1245. Thus, the

court finds that Sato's UCL claim is not preempted to the extent it relies on general allegations of misrepresentation.

But that does not end the discussion. "A plaintiff alleging unfair business practices under [the UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708 (1993). Removing the statutory violations from this claim renders it devoid of sufficient facts to support a UCL violation. What is left are only general, vague and conclusory allegations which lack the "who, what, when, where, and how" required by Rule 9(b). Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). It must be amended to survive.

Accordingly, Claim 3 will be dismissed with leave to amend since Sato may be able to allege additional facts to support misrepresentation. Any amended UCL claim must remove reference to violations of the preempted statutes.

3. Claim 1, 7 & 8: Quiet Title, Injunctive Relief and Rescission

In her first claim, Sato seeks to quiet title in her favor notwithstanding the foreclosure process. Her seventh claim for injunctive relief seeks to postpone the trustee's sale. Sato also seeks to rescind the Notice of Trustee's Sale and re-start the foreclosure process in the eighth claim. To the extent the claim for quiet title is premised on defective notice under § 2923.5, it fails as that statute is inapplicable and preempted by HOLA. Moreover, Sato's allegations in each of these claims that NDex West had no ability to commence foreclosure proceedings due to a violation of California Civil Code § 2934a is directly contradicted by judicially-noticeable documents referenced by Sato in the complaint, which plainly demonstrate NDex was substituted as trustee before the Notice of Trustee's Sale was recorded. RJN, Exs. E, F. Similarly, the claims for injunctive relief and rescission can no longer be maintained based on another judicially-noticeable document - the Trustee's Deed upon sale. RJN, Ex. I.

Under these circumstances, allowing for amendment of the claims would be futile. Claims 1,

7 and 8 are therefore dismissed without leave to amend.

4. Claims 4 & 5: Intentional and Negligent Misrepresentation

Sato's fourth and fifth claims allege fraud based on intentional and negligent misrepresentation. These claims both rely on the allegations that: (1) Defendants failed to properly assign and transfer their rights under the Deed of Trust prior to foreclosure, in violation of certain California statutes, and (2) Wachovia misrepresented to Sato that she had to default on her mortgage payments in order to qualify for a loan modification.

As discussed above, the portion of these claims alleging Defendants' inability to foreclose is contradicted by judicially-noticeable documents and therefore cannot be maintained. The remaining portion of these claims, however, may survive summary dismissal on preemption grounds because they do not attempt to impose substantive requirements on the process of lending, much like Sato's misrepresentation-based UCL claim. This conclusion notwithstanding, however, the Court has determined these claims have not been sufficiently plead.

In California, the elements of fraud are: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud or to induce reliance (4) justifiable reliance; and (5) resulting damage. Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 974 (1997). Although the court looks to state law to determine if the elements of fraud have been properly pleaded, a plaintiff must still meet the federal standard to plead fraud with particularity. Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). Under these standards, the fraud claims are incomplete. While Sato identifies the alleged misrepresentations made to her, she provides little more. She has not adequately alleged that Defendants knew the statements were false, that they intended to deceive her, that her reliance on their statements was justifiable, or that she suffered damages as a result. Moreover, neither claim is plead with particularity. Thus, these claims must be dismissed for much the same reason as her UCL claim.

Claim 4 and 5 will be dismissed with leave to amend. If Sato chooses to amend these claims,

she much remove the allegations alleging statutory violations, and must provide sufficient and particular facts supporting each element of fraud.

5. Claim 6: Promissory Estoppel

For this claim, Sato repeats allegations that Wachovia represented to her numerous times that she must default on her mortgage payments in order to qualify for a loan modification. She also alleges that Wachovia represented there was "no reason that she should not be accepted for a modification." Sato alleges damages due to reliance on these representations. Much like her UCL claim, this claim for promissory estoppel can be read in two ways: one which would result in HOLA preemption in requiring a loan modification or postponement of foreclosure, and one which would not result in preemption by simply alleging promises that were not kept. As with the UCL claim, the court cannot find clear preemption at this point. Love, 915 F.2d at 1245.

This raises the question of whether the promissory estoppel claim has been sufficiently plead. In its current form, it is missing basic facts which render it incomplete. A successful claim for promissory estoppel requires: "(1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance." Boon Rawd Trading Intern. Co., Ltd. v. Paleewong Trading Co., Inc., 688 F. Supp.2d 940, 953 (N.D. Cal. 2010); see also Ecology, Inc. v. State of California, 129 Cal. App. 4th 887, 901-902, 904 (2005). Here, Sato's claim is missing allegations critical to her theory. For this claim to survive, Sato must allege Wachovia represented it would hold foreclosure proceedings while her loan was under review. Without that promise, the other two representations alleged by Sato are meaningless in this context since it is not reasonable to believe, relying only on the representations alleged, that foreclosure was not a possibility even if the loan was under review. More facts are needed to establish the specific promises made.

Since Sato may be able to provide additional facts which would support a claim of

promissory estoppel, claim 6 is dismissed with leave to amend.

II. THE MOTION TO STRIKE

The Court may strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A motion to strike will generally not be granted unless it is clear the matter to be stricken could not have any possible bearing on the subject matter of the litigation. See LeDuc v. Ky. Cent. Life Ins. Co., 814 F. Supp. 820, 830 (N.D. Cal. 1992). Here, Wachovia moves to strike two specific portions of the complaint. However, because the court has granted Wachovia's motion to dismiss all of the claims, the motion to strike will be denied as moot.

III. THE MOTION TO REMAND

Through this motion, Wachovia seeks to remand an unlawful detainer action originally filed against Sato in Monterey County Superior Court. Wachovia also seeks to recover its fees for having to bring this motion. Sato removed this separate action from state court after the commencement of this case, alleging that the court has both federal-question and diversity jurisdiction. Notice of Removal, Docket Item No. 14 at 5-6. She also argues this court should exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 as Wachovia's unlawful detainer action and Sato's wrongful foreclosure action arise between the same parties and involve the same facts. Since the unlawful detainer complaint presents only state claims on its face and diversity jurisdiction is lacking, the court grants Wachovia's motion.

A. Legal Standard

A state court action may be removed to federal court so long as the action could have originally asserted federal-question jurisdiction. 28 U.S.C. 1441(b). The defendant must show the basis for federal jurisdiction. Nishimoto v. Federman-Bachrach & Assoc., 903 F.2d 709, 712 (9th Cir. 1990). Removal jurisdiction statutes are strictly construed against removal. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). A "well-pleaded

complaint" presents a federal-question on the face of the pleading. Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 63 (1987). An anticipated or even actual federal defense is not sufficient to confer jurisdiction. Franchise Tax Bd. of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983). A plaintiff, however, may not defeat removal by purposely omitting necessary federal questions from the complaint. Id. at 22.

1. Federal Question & Supplemental Jurisdiction

Wachovia alleges a single claim against Sato for unlawful detainer. Docket Item No. 14 at Ex. 1. Unlawful detainer claims themselves do not arise under federal law, and therefore, the court lacks federal-question jurisdiction. See, e.g., Fed. Nat'l Mortg. Assoc. v. Lopez, No. C 11-00451 WHA, 2011 U.S. Dist. LEXIS 44818, 2011 WL 1465678 at *1 (N.D. Cal. Apr. 15, 2011); GMAC Mortg. LLC v. Rosario, No. C 11-1894 PJH, 2011 U.S. Dist. LEXIS 53643, 2011 WL 1754053, at *2 (N.D. Cal. May 9, 2011); Wescom Credit Union v. Dudley, No. CV 10-8203 GAF (SSx), 2010 U.S. Dist. LEXIS 130517, 2010 WL 4916578, at *2 (C.D. Cal. Nov. 22, 2010).

Despite what appears to be a clear legal standard, Sato nonetheless asserts that Wachovia violated California's non-judicial foreclosure statutes as a reason for removal. This is not a defense based in federal law. But even if it was, it does not appear on the face of Wachovia's complaint or otherwise confer federal jurisdiction. See Taylor, 481 U.S. at 63 (holding jurisdiction must appear on the face of the complaint); see also Hunter, 582 F.3d at 1042-43 (holding jurisdiction cannot rest on actual or anticipated defense).

Moreover, Sato's argument that this court should exercise supplemental jurisdiction is unavailing. "The supplemental-jurisdiction statute is not a source of original subject-matter jurisdiction, and a removal petition therefore may not base subject-matter jurisdiction on the supplemental jurisdiction statute, even if the action which a defendant seeks to remove is related to another action over which the federal district court already has subject-matter jurisdiction." Pacific Bell v. Covad Communications Co., No. C 99-1491 SI, 1999 U.S. Dist. LEXIS 8846, at *9 (N.D.

Cal. June 8, 1999) (quoting Ahearn v. Charter Twp. Of Bloomfield, 100 F.3d 451, 456 (6th Cir. 1996)). Thus, any relationship between the unlawful detainer action and the wrongful foreclosure case is irrelevant for purposes of removal. There is no basis for either federal question or supplemental jurisdiction here.

2. Diversity Jurisdiction

Sato also alleges jurisdiction since Wachovia is a citizen of South Dakota while she is a citizen of California. Federal courts have original jurisdiction where (1) opposing parties are citizens of different states and (2) the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a). Where diversity is cited as a basis for jurisdiction, removal is not permitted if a defendant in the case is a citizen of the state in which the plaintiff originally brought the action, even if the opposing parties are diverse. See 28 U.S.C. § 1441(b). Much like federal question jurisdiction, diversity jurisdiction simply does not exist here. First, Sato fails to allege the amount in controversy exceeds $75,000 in the Notice of Removal. Second, removal is improper because this case was originally filed in a California state court. Sato is a citizen of California. Docket Item No. 14 at 5. Thus, even assuming the parties are diverse, 28 U.S.C. § 1441(b) prohibits removal by Sato.

Because the court lacks a basis for jurisdiction, the unlawful detainer action will be remanded to Monterey County Superior Court.

B. Request for Attorney's Fees

Wachovia requests an award of fees in connection with this motion to remand. "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Since "[t]he process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources," requiring the payment of fees and costs is appropriate where "the removing party lacked an objectively reasonable basis for seeking removal." Martin v. Franklin Captial Corp., 546 U.S. 132, 140-41 (2005). In Martin, the

Court explained that "district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case." Id. at 141. In addition, the Ninth Circuit clarified in Lussier v. Dollar Tree Stores, Inc., 518 F. 3d 1062, 1065 (9th Cir. 2008) that "removal is not objectively unreasonable solely because the removing party's arguments lack merit, or else attorney's fees would always be awarded whenever remand is granted." Instead, the objective reasonableness of a removal depends on the clarity of the applicable law and whether such law "clearly foreclosed" the arguments in support of removal. Id. at 1066-67.

Here, Wachovia contends Sato lacked an objectively reasonable basis for removal because there are clearly settled reasons why removal is not appropriate. The court agrees. As determined above, there is no basis for jurisdiction disclosed on the face of the complaint, and Sato makes no effort to support her statement contained in the Notice of Removal that this unlawful detainer action somehow arises under federal law. Furthermore, Sato's reliance on diversity as a basis for jurisdiction is unreasonable considering the two doctrines which prevent removal based on diversity are codified and not subject to debate under the facts of this case. This leaves Sato's claim that the court should exercise supplemental jurisdiction. But as already stated, supplemental jurisdiction alone cannot form the basis of subject matter jurisdiction, even if another related action is already pending in federal court. Pacific Bell, 1999 U.S. Dist. LEXIS 8846 at *9; Flower v. Wachovia Mortg., FSB, No. C 09-343 JF (HRL), 2009 U.S. Dist. LEXIS 36299, at *26-27 (N.D. Cal. Apr. 10, 2009). In short, all of Sato's arguments are "clearly foreclosed" by the by the applicable law, and there are no unusual circumstances which would justify a different conclusion especially since Sato is represented by counsel. Since the court cannot find a valid reason for removal, it appears the this case was removed solely to delay the imposition of a state court judgment displacing Sato from the home, and to force Wachovia to sustain additional costs. The court will not countenance such frivolous behavior, especially when the precise purpose of § 1447(c) is to prevent such tactics. An award of fees and costs is therefore appropriate here.

Wachovia seeks a total of $2,145.00 in fees and costs, which amounts to 7.8 hours of time at a rate of $275.00 per hour. See Decl of Yaw-Jiun (Gene) Wu at ¶ 4. Pursuant to § 1447(c), the Court awards fees only for the time spent on the motion to remand as those fees were incurred directly as a result of the removal. See Baddie v. Berkeley Farms, 64 F.3d 487, 490 (9th Cir. 1995). For that reason, the court will not award fees for counsel's communications with either his client or Wells Fargo's other counsel, for analyzing the due date for the motion, or for speaking with the court clerk. Thus, the court finds reasonable a total of 6.8 hours at counsel's hourly rate. Accordingly, Wachovia's request for fees and costs is granted in the amount of $1,870.00.

IV. ORDER

Based on the foregoing:

1. Wachovia's Motion to Dismiss (Docket Item No. 11) is GRANTED WITHOUT LEAVE TO AMEND as to counts 1, 2, 7 and 8. The Motion is GRANTED WITH LEAVE TO AMEND as to counts 3, 4, 5, and 6. Any amended complaint must be filed within 30 days of the date this order is filed.

2. Wachovia's Motion to Strike (Docket Item No. 12) is DENIED AS MOOT.

3. Wachovia's Motion to Remand (Docket Item No. 17) is GRANTED. Wachovia's request for fees pursuant to 28 U.S.C. § 1447(c) is also GRANTED in the amount of $1,870.00.

4. Given the ruling on the Motion to Dismiss, Sato's Ex Parte Motion to Amend the Complaint (Docket Item No. 26) is DENIED AS MOOT.

IT IS SO ORDERED.

Dated: July 13, 2011

EDWARD J. DAVILA
United States District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Robert Arthur Bailey rbailey@afrct.com
Nicole Rae Gallagher MsGallagherEsq@gmail.com
Deepika Singh Saluja deepikas@bdfgroup.com
Edward A. Treder edwardt@bdftw.com
Yaw-Jiun Wu gwu@afrct.com

Dated: July 13, 2011

Richard W. Wieking, Clerk

By: /s/ EJD Chambers
Elizabeth Garcia
Courtroom Deputy